INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statement	2
Argument	6
Conclusion	11

CITATIONS

Cases:

Bruton v. *United States*, 391 U.S. 123	10, 11
Buie v. *United States*, 396 U.S. 87	3-4, 9, 10
Campbell v. *United States*, 352 F. 2d 359	8, 9
Campbell v. *United States*, 415 F. 2d 356	11
Fryar v. *United States*, 404 F. 2d 1071, certiorari denied, 395 U.S. 964	7
Giles v. *United States*, 401 F. 2d 531	7
Glasser v. *United States*, 315 U.S. 60	7
Grosso v. *United States*, 390 U.S. 62	3
Haynes v. *United States*, 390 U.S. 85	3
Kaplan v. *United States*, 375 F. 2d 895, certiorari denied, 389 U.S. 839	7
Leary v. *United States*, 395 U.S. 6	3, 9
Lollar v. *United States*, 376 F. 2d 243	9
Marchetti v. *United States*, 390 U.S. 39	3
Parness v. *United States*, 415 F. 2d 346	11
Roberts v. *Russell*, 392 U.S. 293	10
United States v. *Bentvena*, 319 F. 2d 916, certiorari denied, *sub nom Mirra* v. *United States*, 376 U.S. 940	7

Cases—Continued	Page
United States v. *Covington*, 395 U.S. 57	3
United States v. *Littman*, 421 F. 2d 981, certiorari pending, No. 93, O.T. 1970	11
United States v. *Paz-Sierra*, 367 F. 2d 930, certiorari denied, 386 U.S. 935	8, 9
Statutes:	
26 U.S.C. 4742	2, 3, 4, 9, 10
26 U.S.C. 4744	2, 3, 4, 9, 10
28 U.S.C. 2255	3

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 417

EFRAIN SANTOS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 426 F. 2d 244.

JURISDICTION

The judgment of the court of appeals was entered on April 14, 1970. A petition for rehearing was denied on June 22, 1970. The petition for a writ of certiorari was filed on July 18, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner's retained counsel, who also represented two co-defendants at trial, competently defended him.

2. Whether petitioner's convictions for transferring marihuana without receipt of appropriate order forms are proper.

3. Whether the holdings of the court of appeals on petitioner's direct appeal, regarding the sufficiency of evidence and the admission of a co-conspirator's extrajudicial statements, should now be reexamined.

STATEMENT

1. In 1966, a six-count indictment was filed in the United States District Court for the Northern District of Indiana changing petitioner and four others with violating federal laws relating to marihuana. Petitioner was named in five counts: conspiracy to transfer marihuana on April 16 and May 4, 1966, not pursuant to the order form requirements of 26 U.S.C. 4742(a) (counts 1 and 4); the completed substantive acts (counts 2 and 5), and receiving marihuana on April 16, 1966 without having paid the applicable federal tax, in violation of 26 U.S.C. 4744(a)(1) (count 3). After a jury trial at which petitioner was represented by retained counsel, he was convicted on all counts. On December 16, 1966 he was sentenced to imprisonment for five years on counts 2 and 5, and two years on counts 1, 3 and 4, the sentences to run concurrently.

On direct appeal petitioner challenged the sufficiency of the evidence supporting his convictions, and

attacked the admission in evidence of certain extrajudicial statements attributed to co-conspirators, which he alleged had been made prior to his purported entry into the conspiracy. Petitioner also claimed error in the court's treatment of those statements in the final charge. On November 13, 1967, the court of appeals affirmed the convictions, 385 F. 2d 43 (C.A. 7), certiorari denied, 390 U.S. 954.

After this Court's decisions in *Marchetti* v. *United States*, 390 U.S. 39, *Grosso* v. *United States*, 390 U.S. 62, and *Haynes* v. *United States*, 390 U.S. 85, petitioner, represented by different retained counsel, filed a motion to vacate his sentence, 28 U.S.C. 2255. His principal claim was that the rationale of *Marchetti-Grosso-Haynes* required reversal of all of the counts upon which he was convicted; but he also claimed that prior counsel had given him ineffective assistance. On May 15, 1968, the sentencing court denied the motion. While petitioner's appeal was pending, this Court decided in *Leary* v. *United States*, 395 U.S. 6, and *United States* v. *Covington*, 395 U.S. 57, that a transferee of marihuana charged with violating 26 U.S.C. 4744(a) could assert the Fifth Amendment privilege as a complete defense. On that basis, the court of appeals reversed as to all counts, 417 F. 2d 340 (C.A. 7), leaving the inadequacy of counsel issue unreached. See 417 F. 2d at 342, fn. 1. The government then petitioned for a writ of certiorari, asserting in part that *Leary-Covington* did not apply to the conspiracy and transferor counts charging violations of 26 U.S.C. 4742(a). The Court sustained the government's position as to that statute in *Buie* v. *United States*, 396

U.S. 87, granted the petition for a writ of certiorari in this case, and returned the case to the court of appeals for further consideration in light of *Buie*, 397 U.S. 46. On remand the court of appeals affirmed the judgment of the district court denying relief on the two counts charging violations of 26 U.S.C. 4742(a) and on the conspiracy charges, but adhered to its previous determination that *Leary* required vacation of the conviction under Section 4744(a) (count 3).[1] The Seventh Circuit also examined the question left open in its prior decision, and found that petitioner had not been denied effective assistance of counsel at trial. 426 F. 2d 244, Pet. App. A.

2. The essential facts may be found in a prior opinion of the court of appeals, 385 F. 2d 43, and in the Brief for the United States opposing certiorari in *Santos* v. *United States*, No. 1021, October Term, 1967. Briefly, they show that undercover narcotics agent Bernard Coulter told Francisco and Raymond Arroyo that he had $300 to spend for marihuana. Raymond Arroyo stated that he would "go to see Santos" (petitioner). All three drove to East Chicago, Indiana, where they found petitioner driving his automobile. Raymond Arroyo left Coulter's car to speak with petitioner, and then returned to the car, directing Coulter to follow petitioner to the vicinity of the Frontier Bar. At that location Raymond Ar-

[1] Although the government does not believe that *Leary* applies retroactively to judgments which had become final before the date of that decision it has not, in view of the concurrent sentences, sought to have that question reviewed in this case.

royo again left Coulter's car to speak with petitioner. On his return, Raymond stated that petitioner had to send for the marihuana, and needed $50 immediately. Coulter gave Raymond that amount and observed Raymond apparently give the money to petitioner. Petitioner then entered an unnumbered doorway next to the bar. A half-hour later Raymond went into the same doorway and emerged with co-defendant Gilberto Morales, who, shortly thereafter, delivered the marihuana to Coulter's car. The quantity delivered was in excess of the amount ordered. Raymond stated that he would have to "straighten it out with Santos." He entered the doorway, and when he returned, expressed satisfaction as to the adjustment.

On May 4, 1966, a second purchase was made. After returning to Coulter's car from the entrance way next to the bar, Raymond stated that petitioner had only 1½ pounds of marihuana, and quoted a price. Coulter offered a lesser sum. Raymond left the car to "talk with Santos." He was next seen with petitioner coming out of the doorway next to the Frontier Bar. Ten minutes later Coulter was in a restaurant down the street when he saw Raymond and petitioner outside. Petitioner entered the restaurant and walked over to where co-defendant Edelmiro DeJesus was sitting. They conversed briefly, after which petitioner and DeJesus walked outside to meet Raymond Arroyo. Fifteen minutes later, petitioner came back in and announced in Spanish that everything was ready. Petitioner then stood by and watched as Coulter went to his car and DeJesus and Raymond Arroyo brought him a bag containing marihuana. Petitioner

and DeJesus then walked off together and entered the same doorway they had previously used.

There does not appear to have been proof regarding the manner in which petitioner obtained the marihuana he sold in these transactions. The possession counts, in effect, rested on the proof that he had it under his control before the sales.

ARGUMENT

1. Petitioner was tried jointly with Gilberto Morales and Edelmiro DeJesus. All three were represented by the same retained counsel. At the close of the government's case, and after a motion on behalf of petitioner for a judgment of acquittal had been denied, defense counsel announced that Morales and DeJesus desired to withdraw their not guilty pleas and enter pleas of guilty to one of the counts upon which they were charged. The court accepted the pleas, and thereafter instructed the jury that it was to deliberate only as to petitioner, but that the fact that the co-defendants pleaded guilty was not to be considered as evidence of petitioner's guilt. Petitioner presented no evidence. In its charge to the jury, the court repeated the instruction regarding the co-defendants' guilty pleas, indicating that petitioner's guilt or innocence had to be determined solely by the evidence introduced at the trial.

There is no merit to petitioner's claim that counsel at trial was ineffective because of the joint representation. Common representation has never been deemed to be *per se* error, even where the charge is conspiracy (Pet. 13-16); it must in addition be shown that there was a conflict of interests or other preju-

dice. See, *e.g.*, *Glasser* v. *United States*, 315 U.S. 60; *Fryar* v. *United States*, 404 F. 2d 1071 (C.A. 10), certiorari denied, 395 U.S. 964; *United States* v. *Bentvena*, 319 F. 2d 916 (C.A. 2), certiorari denied *sub nom. Mirra* v. *United States*, 375 U.S. 940.

Petitioner's counsel was not faced with representing inconsistent interests. No indication is given that, but for the joint representation, any defendant would have taken the witness stand, and would then have waived his privilege against self-incrimination in favor of testifying on behalf of the others. Indeed, once both co-defendants had pleaded guilty, defense counsel was free to place full blame upon them.[2] See *Giles* v. *United States*, 401 F. 2d 531 (C.A. 5). Or counsel could have summoned them to testify on behalf of petitioner, if he had deemed it beneficial. Defense counsel made no attempt to do so, evidently because he had reason to believe that Morales and DeJesus could not exculpate petitioner. Present counsel's contention that the joint representation deprived petitioner of the possible factual defense that Morales and DeJesus were agents of the Arroyo brothers (Pet. 13-16), is but speculative after-thought. See *Kaplan* v. *United States*, 375 F. 2d 895, 898 (C.A. 9), certiorari denied, 389 U.S. 839.

The record shows the absence of prejudice to petitioner from the joint representation by his retained

---

[2] The strategy actually employed by defense counsel was to suggest that the only culprits were the Arroyo brothers, who had pleaded guilty prior to trial and had not testified at petitioner's trial. Certainly this defense was not impaired by the joint representation.

counsel. Counsel at trial actively and vigorously cross-examined prosecution witnesses, and several times sought a mistrial. At no time was he compelled to yield a position favoring petitioner by arguing a matter on behalf of the co-defendants. To the contrary, when counsel moved for a judgment of acquittal after the government had closed its case (prior to the change of pleas by Morales and DeJesus), he stated that his motion was being made on behalf of petitioner. His motion was unsuccessful not because of some inherent inadequacy in his representation, but because the court found sufficient evidence to allow the jury to deliberate on petitioner's guilt or innocence.

In *Campbell* v. *United States*, 352 F. 2d 359, on which petitioner heavily relies, the Court of Appeals for the District of Columbia Circuit, in a case involving local street crime, gave the trial judges in that circuit the specific responsibility to assure that a decision by multiple defendants to proceed with one attorney is an informed decision. But that circuit has special local supervisory power; similar obligations have not been imposed on trial judges in any other court of appeals, and have been expressly rejected by the Second Circuit, *United States* v. *Paz-Sierra*, 367 F.2d 930, certiorari denied, 386 U.S. 935. The Second Circuit stated that it would not indulge in the "presumptuous presumption" that a member of the bar will not be faithful to the interests of his clients, and, when aware of any conflicts of interest between those jointly represented, will not disclose it to the court and seek appropriate relief.

(*id.* at 932). Whatever conflict might exist between *Campbell* and *Paz-Sierra* would not appear to present a constitutional question, and is not revealed by the opinion below in this case. In any event, even in *Campbell* relief was denied to a defendant as to whom no prejudice through the joint representation was shown. 352 F.2d at 361. See *Lollar* v. *United States*, 376 F.2d 243 (C.A. D.C.). A similar absence of prejudice is presented in petitioner's case.

2. Although recognizing the import of *Buie* v. *United States*, 396 U.S. 87, that a seller of marihuana charged with violating 26 U.S.C. 4742(a) cannot successfully plead the defense of the privilege against self-incrimination, petitioner urges that when a defendant is charged in the same indictment with being both a transferor (26 U.S.C. 4742(a)) and a transferee (26 U.S.C. 4744(a)) of the same marihuana, the proof establishing the unlawful possession of the marihuana, being violative of the privilege (*Leary* v. *United States*, 395 U.S. 6), taints the selling count as well.

This contention assumes that the evidence relevant to the sale counts is inseparable from the inadmissible evidence on the transferee count. But the only inadmissible evidence regarding the possession count is the evidence of non-compliance with the requirements of the tax law; the evidence of possession itself is admissible. As noted in *Buie*, the conduct constituting compliance with Section 4744(a) is not the same as that needed to comply with Section 4742. The acts of buying and selling are separate and distinct; a new purchase order requirement matures when the sale is

made. Once in possession of the marihuana, no matter how acquired, the transferee complies with section 4742(a) by declining to transfer the marihuana without an order form, whether or not he has already violated section 4744(a). *Buie* v. *United States*, 396 U.S. 87. The evidence that petitioner physically possessed the marihuana was not improper under *Leary*, and is the only evidence on the possession count that might have been relevant to the sale.

3. Petitioner's remaining contentions either were not raised on direct appeal or were disposed of in previous appeals, and thus are not properly before this Court.

a. The assertion that no conspiracy was proved (Pet. 20-22) is merely another means of attacking the sufficiency of the evidence. In a prior review, the court of appeals specifically stated, 385 F.2d 43, 45:

> We hold there was sufficient independent evidence to support the jury's decision as to the existence of a conspiracy on April 16 and another conspiracy on May 4, and that defendant Santos joined in and became a part of each conspiracy.
> * * *

b. Petitioner acknowledges that the claim that the court erroneously admitted extrajudicial hearsay statements made by the Arroyo brothers to agent Coulter prior to proof of petitioner's participation in the conspiracy was resolved against him in the earlier opinion of the court of appeals, 385 F. 2d 43 (Pet. 22-25). He argues that the intervening Supreme Court decision in *Bruton* v. *United States*, 391 U.S. 123, which has been accorded retroactive application (see *Roberts* v. *Russell*, 392 U.S. 293) requires a dif-

ferent result now. However, distinctions between this case and *Bruton* are readily apparent. This case does not involve a post-arrest confession of a co-defendant, with its likely powerful impact upon the jurors, but rather a reference by a witness to the remarks of a co-conspirator, in furtherance of and during the course of a conspiracy. As such, it was admissible against petitioner. See *United States* v. *Littman*, 421 F. 2d 981 (C.A. 2), certiorari pending, No. 93, O.T. 1970; *Parness* v. *United States*, 415 F. 2d 346 (C.A. 3); *Campbell* v. *United States*, 415 F. 2d 356 (C.A. 6); cf. *Bruton* v. *United States*, 391 U.S. at 128, fn. 3.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

WILL WILSON,
Assistant Attorney General.

BEATRICE ROSENBERG,
MERVYN HAMBURG,
Attorneys.

OCTOBER, 1970.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1970 404473 187